

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ZEMENCO, INC., a corporation,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 03-175 Erie
DEVELOPERS DIVERSIFIED	)	
REALTY CORPORATION, a	)	
corporation,	)	
	)	
Defendant.	)	

**EMERGENCY MOTION OF ZEMENCO, INC,  
TO COMPEL FILING OF A CONCISE STATEMENT OF MATERIAL FACTS**

1. Plaintiff Zemenco, Inc. ("Zemenco") submits this motion because the failure of Defendant Developers Diversified Realty Corporation ("Developers") to file a Concise Statement of Material Facts pursuant to Local Rule 56.1 has put them in an extremely difficult position with regard to the upcoming summary judgment hearing set for July 29, 2005. With little more than two weeks remaining until the this Court will hear argument on the pending Motion for Summary Judgment, Developers has not yet filed a Concise Statement of Material Facts.

2. Upon entering their appearance in this case on June 24, 2005, counsel for Zemenco communicated with counsel for Developers regarding this deficiency. See email correspondence from counsel for Zemenco to counsel for Developers dated June 24, 2005 attached hereto as **Exhibit A** and incorporated herein.

3. In a subsequent telephone conversation, counsel for Developers promised to file a Concise Statement of Material Facts within 10 days, or by July 8, 2005, but to date, no Concise Statement of Material Facts has been filed.

4. It is the burden of the moving party to set forth facts sufficient to show that it is entitled to summary judgment. The delay in filing a Concise Statement of Material Facts has placed Zemenco at a considerable disadvantage because the moving party has not put forth what it contends are the undisputed material facts essential to meet its burden.

5. As a Concise Statement of Material Facts will sharpen the issues involved in this case and set forth the essential facts contended by Developers to be undisputed and material, Zemenco asks this Honorable Court to compel Developers to immediately file its Concise Statement of Material Facts.

6. Even after receiving a Concise Statement of Material Facts, Zemenco will still need some fair opportunity to assess the statement and file a response. Zemenco therefore requests that they have until the fifth business day following Developers' filing of their Concise Statement of Material Facts to file a Responsive Concise Statement.

7. In the alternative, if this Honorable Court should decide a Concise Statement of Material Facts is not necessary, Zemenco requests that the Court issue an Order that neither party is required to file a Concise Statement of Material Facts. A proposed Order setting forth alternative relief is attached to this Motion.

WHEREFORE, Plaintiff Zemenco, Inc. respectfully requests that this Honorable Court grant its motion, direct Defendant Developers Diversified Realty Corporation to file immediately its Concise Statement of Material Facts and permit Zemenco until the fifth business day

following the filing of Developers Concise Statement of Material Facts to file its Responsive Concise Statement, or alternatively, that the Court issue an Order that neither party is required to file a Concise Statement Material Facts.

Respectfully submitted,



Joseph A. Katarincic, Esquire

PA ID No. 11427

Christopher P. Furman, Esquire

PA ID No. 89822

THORP REED & ARMSTRONG, LLP

Firm ID No. 282

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Pittsburgh, PA 15219-1425

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**Furman, Christopher P.**

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**From:** Furman, Christopher P.  
**Sent:** Friday, June 24, 2005 3:59 PM  
**To:** 'pdelaney@mijb.com'  
**Cc:** 'bill@starkfirm.com'; 'andy4mps@aol.com'  
**Subject:** Zemenco Inc. v. Developers Diversified Realty Corporation

Sent on behalf of Joseph A. Katarincic

Dear Mr. Delaney:

Please note that I have entered my appearance in Zemenco Inc. v. Developers Diversified Realty Corporation, Civ. No. 03-175, today by mail.

I called you earlier to raise a question regarding the pending motion for summary judgment. I am not certain that there has been compliance with LR 56.1 and particularly subparagraph B and its subparts there under. I also note that subparagraph C may be lacking.

Please call me at your earliest convenience at (412) 394-2388 to discuss this matter.

Kind regards,  
Joseph A. Katarincic

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY on this 13<sup>th</sup> day of July, 2005, that true and correct copies of the foregoing Emergency Motion of Zemenco, Inc. to Compel Filing of a Concise Statement of Material Facts has been served by United States first-class mail, postage affixed thereto, on the following parties:

W. Patrick Delaney, Esquire  
MacDonald, Illig, Jones & Britton  
100 State Street, Suite 700  
Erie, PA 16507-1459

Christopher P. Jones